

**Before the  
Federal Communications Commission  
Washington, DC 20554**

In the Matter of	)	
	)	
Petitions of SBC ILECs and	)	
VarTec Telecom, Inc. For	)	WC Docket No. 05-276
Declaratory Ruling Regarding	)	
The Application Of Access Charges	)	
To IP-Transported Calls	)	
_____	)	

**COMMENTS OF PAC-WEST TELECOMM, INC**

Pac-West Telecomm, Inc. (“Pac-West”), by undersigned counsel and in response to the Commission’s Public Notice released September 26, 2005,<sup>1</sup> offers its comments to the Petitions for Declaratory Ruling filed respectively by the SBC ILECs and VarTec Telecom, Inc. Both SBC and VarTec effectively seek the same result in their respective Petitions – a declaration that a wholesale transmission provider using IP technology to deliver phone-to-phone long distance calls that originate and terminate on the public switched telephone network (“Phone-To-Phone LD Calls”) is liable for access charges. This determination hinges on whether and when the Enhanced Service Provider (“ESP”) exemption applies to ESPs performing wholesale IP transmission. While Pac-West takes no position in these comments on whether an ESP is an end-user or carrier in this instance, Pac-West supports Commission action that reiterates the intercarrier compensation rights or obligations of all companies participating in the delivery of the Phone-to-Phone LD Call.

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<sup>1</sup> *Pleading Cycle Established for SBC’s and VarTec’s Petitions for Declaratory Ruling Regarding the Application of Access Charges to IP-Transported Calls*, WC Docket 05-276, Public Notice, (Sept. 26, 2005).

Neither SBC nor VarTec directly addresses the impact on a CLEC in the call flow of the Phone-To-Phone LD Call. Pac-West urges the Commission specifically to reiterate the compensation rights and obligations of CLECs when they are in the call flow for delivering Phone-To-Phone LD Calls to the terminating LEC or ILEC. In particular, if the Commission determines that the wholesale transmission provider is an IXC, then CLECs are entitled to be paid access for the portion of the service they provide to the IXC. Conversely, if the Commission determines that the wholesale transmission provider is an ESP, the CLECs are required to pay reciprocal compensation to the terminating carrier (either a LEC or ILEC).

**I. The Scope Of This Proceeding Must Be Dictated By The *AT&T Order***

In the *AT&T Order*,<sup>2</sup> the Commission analyzed whether AT&T was required to pay access charges when a traditional 1+ long distance call is converted from a circuit switched format into an IP format; delivered over AT&T's Internet backbone in IP format; converted back to circuit switched format; and then delivered to the called party through a LEC's local business lines. The Commission ruled that this *specific type of service* is a telecommunications service upon which interstate access charges may be assessed. *AT&T Order* at 1. The Commission emphasized that its decision was limited to:

.... an interexchange service that (1) uses ordinary customer premises equipment (CPE) with no enhanced functionality; (2) originates and terminates on the public switched telephone network (PSTN); and (3) undergoes no net protocol conversion and provides no enhanced functionality to end-users due to the provider's use of IP technology. Our analysis in this order applies to services that meet these three criteria regardless of whether only one interexchange carrier uses IP transport or instead multiple providers are involved in using IP transport. *Id.*

Currently, the *AT&T Order* is the only existing Commission precedent that considers whether an IXC is required to pay access charges when IP transport is used to deliver a

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<sup>2</sup> *In the Matter of Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP Telephony Services are Exempt from Access Charges*, WC Docket 02-361, Order (Apr. 21, 2004) ("*AT&T Order*").

traditional phone-to-phone call. Further, the petitions filed by the SBC ILECs and VarTec only request that Commission determine the classification of wholesale transmission providers using IP transport to deliver *telecommunications services*. Accordingly, the scope of this proceeding is quite limited, and the Commission should decline any party's request to use this proceeding as a proxy for determining the appropriate intercarrier compensation for the delivery of phone-to-computer or computer-to-phone VoIP calls.<sup>3</sup> The Commission already is considering those issues in the *IP-Enabled Services* proceeding<sup>4</sup> specifically and the *Intercarrier Compensation Rulemakings*,<sup>5</sup> generally. To the extent the Commission issues any order in this proceeding, it must be limited to Phone-To-Phone LD Calls and it must abide by the framework established in the *AT&T Order*. Any other result would be inappropriate in light of the significant participation by industry in the *IP-Enabled Services* and *Intercarrier Compensation Rulemakings* and the voluminous records that have been created in those proceedings. Pac-West urges the Commission to use the *IP-Enabled Services* and *Intercarrier Compensation Rulemakings* to establish a unified intercarrier compensation regime that that will greatly simplify traffic exchange arrangements and provide much-needed rationality to the process of carriers' using each others networks to complete telephone calls.

To the extent the Commission decides to use this proceeding to classify wholesale transmission providers as either carriers subject to access or as end users not subject to access,

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<sup>3</sup> The Commission already has classified computer-to-computer VoIP calls as unregulated information services. See *Petition for Declaratory Ruling that pulver.com's Free World Dial-Up is Neither Telecommunications Nor a Telecommunications Service*, WC Docket 03-45, Memorandum Opinion and Order, FCC 04-27 (Feb. 19, 2004).

<sup>4</sup> *IP-Enabled Services*, WC Docket No. 04-36, Notice of Proposed Rulemaking, FCC 04-28 (Mar. 10, 2004) ("*IP-Enabled Services*").

<sup>5</sup> *Developing a Unified Intercarrier Compensation*, Notice of Proposed Rulemaking, CC Docket No. 01-92, FCC 01-132 (Apr. 21, 2001); *Developing a Unified Intercarrier Compensation*, Further Notice of Proposed Rulemaking, CC Docket No. 01-92, FCC 05-33 (Mar. 3, 2005) (collectively "*Intercarrier Compensation Rulemakings*").

Pac-West requests that such classification includes clear and specific criteria that can be relied upon by the industry going forward. Therefore, such classification should be plain and unambiguous to eliminate the chance of future disputes between parties involved in the delivery of Phone-To-Phone LD Calls.

## **II. CLECs Jointly Providing Intrastate Access Service Are Entitled to Collect Access Charges from The IXC And Are Not Liable To Pay Access Charges To The Terminating LEC**

For more than twenty years, the Commission has treated every jointly provided interstate access service the same way: it has ruled that local exchange carriers must share access revenue received from the interstate carrier but may not demand other forms of payment from each other. See, e.g., *Reciprocal Compensation Order* at ¶ 9 (“When two carriers jointly provide interstate access..., the carriers will share access revenues received from the interstate service provider”);<sup>6</sup> *Access Billing Requirements* at ¶¶ 22, 24;<sup>7</sup> *Waiver of Access Billing Requirements* at ¶¶ 39-40;<sup>8</sup> *Investigation of Access* at 1176-1177.<sup>9</sup>

In the *AT&T Order*, the Commission recognized this long standing principle when it noted that:

pursuant to section 69.5(b) of our rules, access charges are to be assessed on interexchange carriers. To the extent terminating LECs seek application of access charges, these charges should be assessed against interexchange carriers and *not*

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<sup>6</sup> *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Inter-Carrier Compensation for ISP-Bound Traffic*, CC Docket Nos. 96-98, 99-68, Declaratory Ruling and Notice of Proposed Rulemaking, 14 F.C.C.R. 3703 (Feb. 26, 1999) (“*Reciprocal Compensation Order*”).

<sup>7</sup> *Access Billing Requirements for Joint Service Provision*, CC Docket No. 87-579, Memorandum Opinion and Order, 4 F.C.C.R. 7183 (Oct. 18, 1989) (“*Access Billing Requirements*”).

<sup>8</sup> *Waiver of Access Billing Requirements and Investigation of Permanent Modifications*, CC Docket 86-104, Memorandum Opinion and Order, 2 F.C.C.R. 4518 (July 31, 1987) (“*Waiver of Access Billing Requirements*”).

<sup>9</sup> *Investigation of Access and Divestiture Related Tariff*, Memorandum Opinion and Order, CC Docket No. 88-1145, 97 FCC 2d 1082 (Feb 17, 1984) (“*Investigation of Access*”).

*against any intermediate LECs that may hand off the traffic to the terminating LECs, unless the terms of any relevant contracts or tariffs provide otherwise.*<sup>10</sup>

Most interconnection agreements between CLECs and ILECs include meet point billing provisions that specify how CLECs and ILECs are to provision access services jointly for IXCs. These provisions typically include the manner in which such access charges will be divided between the carriers and significantly do not provide one carrier with the right to bill the other carrier for the access charges.<sup>11</sup> As such, when a long distance call is routed by a CLEC from a wholesale transmission provider for termination with a LEC or ILEC, the terminating carrier is not entitled to seek reimbursement from the CLEC of the access charges owed by the IXC for the delivery of that call. In the *CLEC Access Charge Order* at ¶ 16,<sup>12</sup> the FCC recognized that meet point billing guidelines only permit a carrier to *collect access from the IXC* for that portion of service provided by the carrier. Under no circumstances is the terminating LEC/ILEC entitled to collect any access charges from the CLEC that is jointly provisioning the access service.

Accordingly, under long standing Commission precedent and industry standard provisions in interconnection agreements, CLECs jointly providing interstate access services are entitled to collect their share of access charges from the responsible IXC, pursuant to any applicable contracts or tariffs; and, similarly, the terminating LEC/ILEC only is entitled to

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<sup>10</sup> *AT&T Order*, n.92 (emphasis supplied).

<sup>11</sup> See SBC-13 State, Intercarrier Compensation Appendix, Section 11. Section 11.3 provides: “Billing for the Switched Exchange Access Services jointly provided by the Parties via MPB arrangements shall be according to the multiple bill/single tariff method. As described in the MECAB document, each Party will render a bill in accordance with its own tariff for *that portion of the service it provides*.” (emphasis supplied) Section 11.5 provides: “As detailed in the MECAB document, the Parties will exchange all information necessary to accurately, reliably and promptly *bill third parties* for Switched Access Services traffic jointly handled by the Parties via the Meet Point Billing arrangement.” (emphasis supplied)

<sup>12</sup> *Access Charge Reform, Reform of Access Charges Imposed by Competitive Local Exchange Carriers, Eighth Report and Order and Fifth Order on Reconsideration*, CC Docket No. 96-262, ¶ 16 (May 18, 2004) (“*CLEC Access Charge Order*”). (emphasis supplied)

collect its share of the access charges from the IXC. Pac-West requests that the Commission find that, under no circumstances, is a CLEC liable to a terminating LEC/ILEC for access charges in these instances unless the parties contractually agree to such an arrangement.

### **III. CLECs Delivering Traffic from ESPs Are Entitled To Route Calls Over Local Facilities And Only Are Required To Pay Reciprocal Compensation To The Terminating LEC**

To the extent the Commission determines that wholesale transmission providers using IP technology are ESPs, Pac-West requests that the Commission confirm that Phone-To-Phone LD Calls delivered by ESPs may be routed over local interconnection facilities. CLECs routing such calls are required to pay the terminating LEC or ILEC reciprocal compensation, not access. Such a conclusion would be consistent with long standing Commission rules and orders concerning the classification of ESPs and IXCs.

The Commission requires IXCs (and only IXCs) to pay access charges to LECs for use of the LECs/ILECs' facilities to originate or terminate long-distance calls.<sup>13</sup> The Commission developed (and repeatedly reaffirmed) a different rule for ESPs, a classification covering providers with services that "offer[] a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications." 47 U.S.C. § 153(20).<sup>14</sup> Even though ESPs "may use ILEC facilities to originate and terminate

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<sup>13</sup> See 47 C.F.R. § 69.5(b) (providing that carrier switched access charges "shall be computed and assessed upon all *interexchange carriers* that use local exchange switching facilities for the provision of interstate or foreign telecommunications services") (emphasis added); *see also MTS and WATS Market Structure, Phase I*, Memorandum Opinion & Order, 97 FCC 2d 682, 707 ¶ 63 (1983) ("*MTS and WATS Market Structure Order*").

<sup>14</sup> The Commission regards the term "information service" from the Telecommunications Act of 1996 (*see* 47 U.S.C. § 153(20)) as interchangeable with the pre-existing regulatory term "enhanced service," at least in the context of access-charge regulation. *See Access Charge Reform; Price Cap Performance Review for Local Exchange Carriers; Transport Rate Structure and Pricing End User Common Line Charges*, First Report and Order, 12 F.C.C.R. 15,982, 16,131 ¶ 341 n.498; *see also id.* at 16,165 ¶ 430 (describing NPRM as initially directed toward "enhanced service providers (which we now refer to as information service providers, or ISPs)") ("*Access Charge Reform*").

interstate calls,” the Commission decided that ESPs should *not* be required to pay interstate access charges, regardless of whether the call might colloquially seem “local” or “long distance.”<sup>15</sup>

This distinction, known as the “ESP exemption,” allows ESPs to purchase services from all LECs under the same tariffs available to end users rather than those applicable to carriers.<sup>16</sup>

As a matter of definition and for purposes of assessing charges, therefore, the Commission treats ESPs as end users exempt from the “carrier’s carrier” access charges paid by IXC.

Accordingly, LECs receive either reciprocal compensation or end-user charges for such traffic.<sup>17</sup>

Under the existing regime, therefore, LECs and ILECs receive access charge payments from IXCs when they originate or terminate the interexchange calls they carry and reciprocal compensation or end-user charges when they originate or terminate calls carried by ESPs.

Accordingly, to the extent the Commission determines that a wholesale transmission provider who delivers a long distance call to a CLEC, like Pac-West, is an ESP, such CLEC is entitled to route that long distance call over local interconnection, not access facilities. In such instance, the CLEC only is required to compensate the terminating LEC or ILEC reciprocal compensation. In responding to the Declaratory Ruling Request, Pac-West urges the Commission to reiterate these long-standing principles.<sup>18</sup> Moreover, the Commission also

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<sup>15</sup> *Access Charge Reform*, 12 FCC Rcd. at 16,131-32 ¶ 341 (1997) (emphasis added); *see also MTS and WATS Market Structure Order*, 97 FCC 2d at 715 ¶ 83.

<sup>16</sup> *Access Charge Reform Order*, 12 FCC Rcd. at 16,132 ¶ 342.

<sup>17</sup> *See* 47 U.S.C. § 251(b)(5) (reciprocal compensation); *MTS and WATS Market Structure Order*, 97 FCC 2d at 715 ¶ 83 (end-user charges).

<sup>18</sup> In addition, Pac-West notes that SBC, in particular, has engaged in self-help by charging access to certain carriers because, in SBC’s sole judgment, such carriers were IXCs and obligated to pay access. SBC’s relationship with IXCs typically are governed by its tariffs and its relationships with CLECs typically are governed by interconnection agreements. It is inappropriate for SBC unilaterally to determine whether access is owed when these agreements govern the relationship between parties. To the extent, these agreements do not contemplate whether, for example, a wholesale transmission provider

should rule that CLECs are not required to police the traffic that they receive from ESPs to confirm that such traffic is 251(b)(5) traffic. In other words, as the Commission is considering in the *Grande Proceeding*,<sup>19</sup> CLECs should be able to rely on the representations of their ESP customers when delivering traffic from those customers.

#### **IV. Conclusion**

Regardless of how the Commission chooses to classify a wholesale transmission provider using IP technology to deliver a phone-to-phone long distance call, the Commission's decision should clearly be limited to those facts, be consistent with the *AT&T Order* and should reiterate that an intermediate CLEC is entitled to collect access or is required to pay reciprocal compensation, depending on the status of the wholesale provider as a carrier or end-user. Moreover, if the Commission does create rules to guide the industry as to whether a wholesale transmission provider delivering Phone-To-Phone LD Calls is a carrier or a end user, such rules must be specific, clear and unambiguous to provide certainty to the industry going forward.

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Respectfully submitted:

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delivering Phone-To-Phone LD Calls is an IXC, SBC may not use self-help to achieve a resolution that it deems desirable. Rather, SBC must follow the rules created by the Commission in this proceeding or other relevant FCC proceedings, such as *IP-Enabled Services* and the *Inter-carrier Compensation Rulemakings*.

<sup>19</sup> *Petition for Declaratory Ruling of Grande Communications, Inc. Regarding Self-certification of IP-Originated VoIP Traffic*, WC 05-283 at 25 (filed Oct. 3, 2005) (“*Grande Proceeding*”).